



The State of New Hampshire
Department of Environmental Services

Michael P. Nolin
Commissioner



February 8, 2006

The Honorable Peter F. Bergin
House Executive Departments and Administration Committee
LOB, Room 306
Concord, NH 03301

Re: HB 1381, relative to requiring the department of environmental services to do a criminal background check on any applicant for a permit

Dear Representative Bergin and Members of the Committee:

Thank you for the opportunity to comment on HB 1381, which would require the Department of Environmental Services to do a criminal background check on any applicant for a permit. The Department has concerns about the bill as written.

The bill would require the Department to do a "criminal history record check of any applicant for any air, soil, or water permit that as part of the permit authorizes the discharge, storage, or emission of any pollutant into or onto the air, water, or soil..." (Page 1, lines 11-13) The bill would require all applicants to "submit notarized criminal history record release forms to the department" (page 1, lines 15-16), and would provide that "no person shall receive a permit who has not [submitted the release forms]" (page 1, lines 18-19). The bill further would provide that "[n]o applicant who is a convicted felon shall be issued a permit." (Page 1, line 30)

The Department is concerned that the bill would not add sufficient value to most of the Department's permitting activities to outweigh the costs to applicants, is unclear, would create costs that are not reflected in a fiscal note, and would create an unmanageable permit-renewal system.

The Department currently processes applications for over 10,000 applications per year that could be construed as authorizing "the discharge, storage, or emission of any pollutant into or onto the air, water, or soil". This broad category includes applications for significant air emissions (*e.g.*, Title V permits under the Clean Air Act and RSA 125-C) and water discharges (*e.g.*, National Pollutant Discharge Elimination System ("NPDES") under the Clean Water Act and RSA 485-A), but also includes applications for less environmentally-significant activities, such as to fill a small area of wetlands in order to build a residence, to operate emergency generators for business continuity, to install septic systems, or to alter terrain in order to develop property. The Department does not believe that it would be a value-added process to require all applicants for all permits to go through a criminal history record check. The Department further believes that it is impracticable to automatically deny permits to applicants who may, at any point in their lives, have been convicted of (or pled guilty or no contest to) any felony charge, regardless of whether it had any bearing on their current fitness to undertake the proposed activity.

Further, it is not clear in the bill as written what happens in the case of an applicant that is not an individual but rather is a business entity, political subdivision, or other organization. That is, it is unclear whether the records check would be done on the entity itself, the individual who happened to sign the application on behalf of the entity, or some other individual or individual(s). The bill also does not make allowances for those who may need several permits to undertake a single project, but rather appears to require that a separate release form be submitted and processed for each application.

The Department believes that, in most cases, costs to applicants will significantly exceed any value that might be derived from the records check. The bill would require the New Hampshire State Police to "conduct a criminal history record check for any applicant for a permit, and process it through the Federal Bureau of Investigation." (Page 1, lines 23-24) The bill also would require the applicant to bear "[a]ll costs arising from the processing of criminal history record check" [sic] (page 1, lines 25-26). The bill would limit costs to "the actual direct and indirect costs arising from the processing of the criminal history record check" (page 1, lines 27-28). Currently, direct costs are \$39 per records check. However, if "indirect costs" includes the time (salaries and overhead) for the Department, the State Police, and the FBI to process the records check and the billing for the records check, then the applicant likely will pay substantially more than that. If "indirect costs" do not include such costs or if the agencies otherwise do not bill for such costs, for instance because their accounting systems do not accommodate tracking time in this way, then the state and federal governments (i.e., state and federal taxpayers) will bear the costs. Further, the Department receives many applications for permits that would be covered by this bill from municipalities, counties, and other political subdivisions. Requiring those applicants to pay for a criminal records check would appear to conflict with Part I, Article 28-a of the New Hampshire Constitution relative to "unfunded mandates".

Finally, the bill would cause all currently-effective permits to expire in three years and would limit permit renewals to another three-year term. (Page 2, lines 2-3) Over the years, the Department has worked diligently to ensure that permit terms for on-going operations reflect a length commensurate with the nature of the permitted activity, such that permits are reviewed frequently enough to capture changes in operations and technologies but not so frequently as to place a burden on the permit holder or on State resources. Many permits thus are issued for terms longer than three years (including Title V air emissions permits and surface water discharge permits, which are issued for five-year terms), and some permits do not expire at all (e.g., septic system operation approvals). The Department also has a compliance assurance program to periodically check the compliance status of on-going business operations, which also reflects the level of concern and the level of resources available. Requiring all of the permits that have been issued by the Department to be reviewed under this bill within the next three years puts an untenable burden on the Department that is not reflective of the benefit that might be gained. Further, the bill would have an unduly harsh effect if a permit holder is convicted of a felony having nothing to do with the permitted activity. For example, if a homeowner with an approved septic system is convicted of negligent homicide as a result of a DUI accident, the bill would require the Department to terminate the septic system approval -- thus rendering the family's residence uninhabitable. In the case of a principal of an on-going business, requiring the Department to not reissue a permit that is necessary for the business's operations, which then causes the company to have to close (with all of the associated negative impacts on the State's economy), is equally unreasonable.

Since at least 1988, RSA 149-M has allowed (but not required) the Department to deny an application for a solid waste facility permit if an individual applicant or, in the case of a business entity, any officer, director, partner, key employee, or individual/entity holding 10% or more of the applicant's equity or debt liability, "has been convicted of, or pled guilty or no contest to, a felony in any state or federal court during the 5 years before the date of the permit application." (Currently, RSA 149-M:9, IX(b) and (c).) To implement this, a background investigation questionnaire has been developed in conjunction with the New Hampshire Attorney General's Office ("AGO"). The Department provides the questionnaire to applicants and the applicants provide the completed questionnaire directly to the AGO. The AGO then conducts its investigation, which is more intensive than a simple records check through the State Police and Federal Bureau of Investigation, and provides the results to the Department for consideration during the permitting process. The AGO bills applicants for the time and out-of-pocket expenses arising from the investigation. The background check is waived for applications that are deemed to be "environmentally insignificant" and for political subdivisions.

This model, where the Department receives complete information and can make an informed decision regarding whether the applicant's (time-limited) history raises concerns for the current proposed activity, has worked well for significant solid waste facilities. To the extent the Legislature deems it to be sound public policy to require some kind of background investigation for other environmental permits, the Department strongly suggests that the investigations be modeled after RSA 149-M:9, IX, such that they are time-limited, apply only to those permits with the potential to have a significant impact on public health or the environment, and give the Department the flexibility to determine whether the applicant is truly unfit to operate under the proposed permit.

Thank you for your consideration of these comments. If you have any questions, please contact Gretchen Hamel, Legal Unit Administrator, at 271-3137 or ghamel@des.state.nh.us.

Sincerely,



Michael P. Nolin
Commissioner

cc: Representative Owen
Representative Phinizy